MOHD. NORDIN JOHAN

v.

THE ATTORNEY-GENERAL, MALAYSIA

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH ACTING LP
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 233 OF 1982]
17 SEPTEMBER 1982

CRIMINAL LAW AND PROCEDURE: *Security case - Certiorari - Application to quash (i) certificate issued by Attorney-General under reg. 2(2) of the Essential (Security Cases) Regulations, 1975 (ii) the consequential certificate issued under reg. 6(1) of the said Regulations and (iii) the consequential order of the Magistrate, Tampin, transferring the arrest case to the High Court, Kuala Lumpur - Whether murder is an offence which affects security of the Federation - Whether power conferred upon the Attorney-General by reg.2(2) is reviewable by Court.*

This was an appeal against the refusal to grant leave by the learned Judge of the High Court, Kuala Lumpur for the appellant to apply for an order of *certiorari* to quash (i) the certificate issued by the Attorney-General under reg. 2(2) of the Essential (Security Cases) Regulations 1975, (ii) the consequential certificate issued by him under reg. 6(1) of the certificate of the said Regulations and (iii) the consequential order of the learned Magistrate, Tampin, transferring the arrest case in question to the High Court, Kuala Lumpur. On 13 July 1982 the appellant together with the accuseds appeared before the High Court, Kuala Lumpur and claimed trial. The case was fixed for hearing on 11 October 1982. On 10 July 1982 the appellant together with 4 others, were charged in the magistrate's Court, Tampin with the murder of the former speaker of the State Assembly, Negeri Sembilan, Dato' Mohd. Taha bin Talib on 14 April 1982 an offence punishable under s. 302 of the Penal Code read with s. 34 of the same Code. The alleged offence was committed 7 days after nomination day for the Federal and State General Elections 1982 which were held on 22 April 1982.

The gravamen of the appellant's case was that murder is not an offence which affects the security of the Federation in the context of reg. 2(2) and said that the regulation was framed in an "objective" form - "in the opinion" of the Attorney-General. It was contended that the Attorney-General had acted on extraneous considerations which ought not to have influenced him and he had thus acted in excess of the power conferred upon him by the regulation. The Attorney-General however argued that the power conferred upon him by reg. 2(2) was one of pure judgment and was not reviewable by this Court and said the test was subjective. The sole question was simply whether reg. 2(2) confers on the Attorney-General a discretion which is a matter of pure judgment or it imposes a condition that there must in fact exist some basis which he must take into consideration before he can validly exercise the discretion, the condition being that the commission of the offence affects the security of the Federation.

There was another appeal (Federal Court Civil Appeal No. 218/82) by the appellant against the decision of the learned Judge under O. 18 r. 19 of the Rules of the High Court, 1980 who struck off an originating summons for declaratory relief to impugn the certificate issued by the Attorney-General under reg. 2(2) and 6(1) of the Essential (Security Cases) Regulations 1975 and the order of the learned Magistrate transferring the case to the High Court, Kuala Lumpur.

Held:

[1] The appeal was allowed and the appellant was granted leave to apply for an order of *certiorari* because the Federal Court was of the view that the learned Judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantial motion for *certiorari.*

[2] As leave was granted, this Court had jurisdiction to hear the substantive motion itself and this practice was not inconsistent with the one vogue in England.

[3] The language of the regulation leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Attorney-General had acted in forming his opinion. His opinion in the context of the regulation in question was not open to review and a contrary construction would render inefficacious the whole purpose and scheme of the Regulations as a whole.

[4] Regulation 2(2) attracts the pure judgment of the Attorney-General, cannot be subjected to an objective test and was not accordingly amenable to judicial review. Accordingly, the motion for an order of *certiorari* was dismissed.

[5] As for the declaratory relief, the Court was of the view that in the circumstances of this case *certiorari* was the appropriate remedy to be sought and not a declaration.

[6] To dispose of the matter the civil appeal was allowed and the judgment of the learned Judge was set aside. However, at the Federal Court's suggestion, the originating summons was withdrawn and the summons was accordingly struck out.

[Criminal appeal allowed. Leave to apply for an order of certiorari was granted. Motion for an order of certiorari dismissed. Civil appeal allowed and Judgment was set aside. Originating summons withdrawn & Summons struck out]

Cases referred to:

Merdeka University v. Government of Malaysia [1981] CLJ (Rep) 191; [1981] 2 MLJ 356
Romesh Thappar v. State of Madras [1950] AIR SC 124
Ram Nandan v. State [1959] AIR Allahabad 101
PP v. Oh Keng Seng [1976] 2 MLJ 128
R v. Home Secretary, Ex parte Hosenball [1977] 1 WLR 766
Mak Sik Kwong v. Minister of Home Affairs (No. 2) [1975] 2 MLJ 176
Education Secretary v. Tameside Borough Council [1977] AC 1014
Regina v. Sec. of State for the Environment, Ex parte Norwich City Council [1982] 2 WLR 580
Regina v. Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union [1966] 2 QB 21
Regina v. Croydon Justices, Ex parte Lefore Holdings Ltd. [1980] 1 WLR 1465
Hubli Electricity Company, Limited v. Province of Bombay LR 76, IA 57
Sungei Wangi Estate v. Uni [1975] 1 MLJ 136
Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147
Re Tillmire Common, Heslington [1982] 2 All ER 615

Legislation referred to:

Essential (Security Cases) Regulations 1975, reg. 2(2), 6(1)
Internal Security Act 1960, ss. 57, 58, 59, 60, 61, 62
Electricity Act 1910 [Ind], s. 4(1)
Penal Code, ss. 34, 302
Rules of the High Court 1980, O. 18 r. 19

For the appellant - G. Sri Ram; M/s. Sri Ram, Zulkifly & Kumar
For the respondent - Abu Talib (Lim Beng Choon with him), Attorney-General, Malaysia

JUDGMENT

Raja Azlan Shah Acting LP:

This is an appeal against the refusal of the learned Judge to grant leave to apply for an order of *certiorari* to quash (i) the certificate issued by the Attorney-General under reg. 2(2) of the Essential (Security Cases) Regulations 1975, (ii) the consequential certificate issued by him under reg. 6(1) of the said Regulations and (iii) the consequential order of the learned Magistrate, Tampin, transferring the criminal case in question to the High Court, Kuala Lumpur.

On 10 July 1982 the appellant together with four others, one of whom is the Federal Minister of Culture, Youth and Sports, were charged in the Magistrate's Court at Tampin, Negeri Sembilan with the murder of the former Negeri Sembilan State Assembly Speaker, Dato' Mohd. Taha bin Talib, an offence punishable under s. 302 of the Penal Code read with s. 34 of the same Code. The alleged offence was committed on 14 April 1982 that is 7 days after nomination day for the Federal and State General Elections 1982 which were held on 22 April 1982.

The learned Attorney-General who appeared for the prosecution tendered two certificates under reg. 2(2) and 6(1)of the Essential (Security Cases) Regulations 1975. The effect of the two certificates is that the Attorney-General treated the offence as a security offence and specified the High Court, Kuala Lumpur as the place of trial. He then successfully applied for transfer of the case to the High Court, Kuala Lumpur. On 13 July 1982 the appellant together with the other three (one has since died) appeared before the High Court, Kuala Lumpur. They claimed trial. The case was then fixed for hearing to commence on 11 October 1982.

Regulations 2(2) and 6(1) of the Essential (Security Cases) Regulations 1975 read as follows:

> 2(2) Where the commission of any offence against any written law other than ss. 57, 58, 59, 60, 61, and 62 of the Internal Security Act 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these Regulations.
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> 6(1) Where a security case is triable by the High Court, no preliminary enquiry shall be held in respect thereof, and the Magistrate before whom the accused is produced shall forthwith commit the accused for trial by the High Court at such place (whether within the same State or not) as the Public Prosecutor may specify and upon such charge as the Public Prosecutor may prefer.

On 29 July 1982 the appellant filed an *ex parte* originating motion for leave to apply for an order of *certiorari* to quash the two certificates and the other of the learned Magistrate transferring the case to the High Court, Kuala Lumpur. The gravamen of the appellant's case is that murder is not an offence which affects the security of the Federation in the context of reg. 2(2). Counsel on his behalf said that the regulation is framed in an "objective" form - "in the opinion" of the Attorney-General. He submitted that there is a condition precedent to be fulfilled before the Attorney-General can classify the case as a security offence, namely, that the offence must be one that affects the security of the Federation. He said the appellant is not a communist, a communist terrorist or insurgent or a subversive element, nor are the other three accused persons. Therefore it is contended that the Attorney-General had acted on extraneous considerations which ought not to have influenced him and he had thus acted in excess of the power conferred upon him by the regulation. Counsel referred us to the following cases: *Merdeka University v. Government of Malaysia* [1981] CLJ (Rep) 191, *Labour Department v. Merrit Beazley Homes Ltd* 1 NZLR 505, 506; *Romesh Thappar v. State*

of Madras [1950] AIR SC 124 at 127; *Ram Nandan v. State* [1959] AIR Allahabad 101; *PP v. Oh Keng Seng* [1976] 2 MLJ 128, 132; *R v. Home Secretary, Ex parte Hosenball* [1977] 1 WLR 766, 781.

On the other hand the Attorney-General argued that the power conferred upon him by reg. 2(2) is one of pure judgment and is not reviewable by this Court. He said the test is subjective and referred us to the following cases: *Mak Sik Kwong v. Minister of Home Affairs (No. 2)* [1975] 2 MLJ 176, 178; *Education Secretary v. Tameside Borough Council* [1977] AC 1014, 1047; *Regina v. Sec. of State for the Environment, Ex parte Norwich City Council* [1982] 2 WLR 580, 593.

We allowed the appeal and granted the appellant leave to apply for an order of *certiorari* because we are of the view that the learned Judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for *certiorari.* When this Court grants leave, it has jurisdiction to hear the substantive motion itself. This practice is not inconsistent with the one in vogue in England; See *Regina v. Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union* [1966] 2 QB 21 which was followed in *Regina v. Croydon Justices, Ex Parte Lefore Holdings Ltd.* [1980] 1 WLR 1465.

We now turn to the substantive motion which Counsel for the appellant undertook to formally file in the registry. In our view the sole question which the Court must ask itself, and answer, in this case is simply whether reg. 2(2) confers on the Attorney-General a discretion which is a matter of pure judgment or it imposes a condition that there must in fact exist some basis which he must take into consideration before he can validly exercise the discretion, the condition being that the commission of the offence affects the security of the Federation. We note that reg. 2(2) is certainly draconian in its terms. On the other hand Parliament has authorised the Yang di-Pertuan Agong to make the Regulations read in the light of its context, background and purpose in such a way as to confer a wider power on the Attorney-General than that as for example conferred on the Secretary of State in the *Tameside* Case (*supra*) which was held to attract the objective process. In this connection we would refer to a judgment of the Judicial Committee of the Privy Council in *Hubli Electricity Company, Limited v. Province of Bombay* LR 76 IA 57. In that case s. 4, subsection 1, of the Indian Electricity Act, 1910, which was the subject for determination, reads as follows:

> The Provincial Government may, if in its opinion the public interest so requires, revoke a licence in any of the following cases, namely: (a) where the licensee in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act.

It was held on the construction of that provision that it was the subjective opinion of the Government which was relevant; not the grounds on which the opinion is based. Further, the relevant question was that there had been a wilful and unreasonably prolonged default; not that a default had been wilfully and unreasonably prolonged. Similarly, in the present case, we think the subjective opinion of the Attorney-General that the alleged commission of the offence of murder by five accused persons affects the security of the Federation is the determinative factor. The language of the regulation leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which he acted in forming his opinion. His opinion in the context of the regulation in question is not open to review and a contrary construction would render inefficacious the whole purpose and scheme of the Regulations as a whole. As Lord Wilberforce said in *Tameside* (*supra* at p. 1047):

But there is no universl rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at.

We therefore conclude that reg. 2(2) attracts the pure judgment of the Attorney-General, cannot be subjected to an objective test and is not accordingly amendable to judicial review. We accordingly dismissed the motion for an order of *certiorari.*

That is not the end of the matter before us. There was another appeal (Federal Court Civil Appeal No. 218/82) by the appellant regarding an originating summons for declaratory relief which he had earlier brought and which was struck out by the learned Judge under O. 18, r. 19 of the Rules of the High Court 1980. The appellant had also in that case sought to similarly impugn the certificates issued by the Attorney General under reg. 2(2) and 6(1) of the Essential (Security Cases) Regulations 1975 and the order of the learned Magistrate transferring the case to the High Court, Kuala Lumpur. We think that in the circumstances of this case *certiorari* is the appropriate remedy to be sought and not a declaration, and we need only refer to the judgment of Abdoolcader J in *Sungei Wangi Estate v. Uni* [1975] 1 MLJ 136; *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 (per Lord Reid at p. 213 and per Lord Pierce and p. 233) and *Re Tillmire Common, Heslington* [1982] 2 All ER 615, 622 in support. To dispose of this matter we allowed this other appeal and set aside the judgment of the learned Judge in that case, and Counsel on behalf of the appellant then very properly at our suggestion withdrew the originating summons which we accordingly struck out.

Also found at [1983] 1 CLJ 130